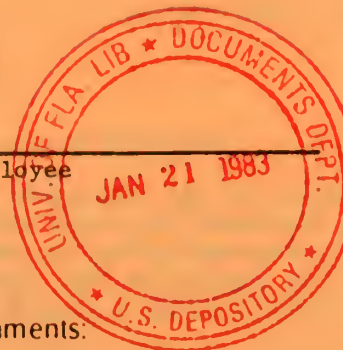


Federal Personnel Manual System**FPM Letter** 751-1**SUBJECT:** Taking Action on the Problem Employee**RETAIN UNTIL SUPERSEDED**

Washington, D. C. 20415

January 11, 1983

Heads of Departments and Independent Establishments:

1. One of the primary goals of the Civil Service Reform Act was to enhance the ability of managers to manage by establishing systems for the accurate appraisal of their employees' performance, and simplifying the procedures for dealing with problem employees. Nevertheless, I am concerned that supervisors and managers may still not be making full use of the many options to deal with problem employees.

2. Especially in this time of Government contraction, managers and supervisors must get the best work possible from employees. Most employees are self-disciplined and motivated to work for their own and the agency's best interest. A great percentage of management time can best be spent by rewarding work well done and thereby improving already good performance. The following actions are generally effective as positive motivators:

- ° Seeing that standards of performance and conduct are established and clearly communicated to employees.
- ° Setting the desired example by the manager's or supervisor's own conduct.
- ° Monitoring performance and giving frequent oral and written feedback.
- ° Rewarding good performance through incentive awards or merit pay.
- ° Maintaining a good work atmosphere.
- ° Assuring that employees conform to any applicable standards of conduct.
- ° Making full use of the probationary periods for new employees and supervisors as the test of actual performance on the job.
- ° Maintaining effective lines of communications with the labor relations staff and union representatives.

3. The attachment to this letter contains a discussion, directed toward the manager or supervisor, of how to recognize and deal with emerging problems. One question often asked is whether to use the performance appraisal system and procedures for performance-based actions or the general disciplinary system and procedures for adverse actions. The attachment makes this fundamental distinction

Inquiries: Appellate Policies Division, Office of Planning and Evaluation (202) 254-5517**Code:** 751, Discipline**Distribution:** FPM

clear in a way useful for the individual who is not a specialist in personnel management. It also discusses two areas which often create problems for supervisors: leave, and handicapping conditions including alcoholism and drug use. I recognize that each agency has conditions and requirements specific to it alone, but I believe that this guidance gives a good general view of problems and possible solutions.

4. Managers and supervisors are not always aware of FPM issuances, even when the material may pertain directly to their operations. Therefore, OPM will issue this material as soon as possible as a Personnel Management Series handbook, in order to make it readily available to agencies' managers and supervisors.

A handwritten signature in dark ink, consisting of a large, stylized 'D' followed by a horizontal line and a small flourish.

Donald J. Devine
Director

Attachment

TAKING ACTION ON THE PROBLEM EMPLOYEE

I. INTRODUCTION

A. Many times, you as managers or supervisors are faced with employees whose performance or conduct raises problems. Not sure how to proceed or believing that any action is too difficult, you may let these problems slide. Inaction is not usually the answer because it may turn small difficulties into major disruptions. This FPM letter will help you take action on your problems by discussing the decision making process you should use when faced with problem employees, explaining the distinction between performance and conduct problems, and outlining briefly the procedures that must be followed. Part II of this guidance sets forth the decision making process. Parts III and IV cover the procedures for performance actions, suspensions of 14 days or less, and more severe disciplinary actions. The letter also explains how you should deal with counseling and documentation, often major sources of concern.

B. You must be aware of your labor relations obligations to the employee and to the exclusive representative in any effort to deal with problem employees. You should familiarize yourself with provisions of collective bargaining agreements applicable to your employees, particularly those applying to performance appraisals, actions related to unsatisfactory performance, and disciplinary actions. You should also develop an ongoing line of communication with your labor relations staff and with union representatives.

C. While this letter primarily deals with employees who have completed their probationary periods, do not put off actions during the probationary period if a problem is evident then. You have at that time the authority to separate the employee with fewer procedures. Any delay in taking action until the probationary period is over will confront you with an even greater problem more difficult to solve.

II. THE BASIC DECISION

A. Occurrence of incident(s)

1. Decisions to be made

The employee has done something or failed to do something which adversely affects his or her work, the ability of other employees to do their jobs, or the agency's mission. You are faced with decisions on how to handle the incident or series of incidents. First, you must decide whether the incident involves the employee's poor performance on the job or involves an act of misconduct. Next, you must decide what type of action will best deal with the incident(s).

2. Performance

Are the problems raised performance ones; that is, reports which are prepared unacceptably, typed documents with many errors, processing forms incompletely filled out? Is the employee's discourtesy causing problems in a job requiring constant dealings with the public? Are these instances of poor work included in the employee's assigned job tasks covered by one or more critical elements and performance standards? Has the employee been informed in writing of the elements and standards so that he or she knows what is expected? If you answer these questions positively, such incidents can be handled under the procedures for counseling, reductions in grade or removal for unacceptable performance, a nondisciplinary method specifically aimed at handling continuing performance problems easily

and without delay. See Part III for the steps involved. If poor performance results from outright refusal to do the work rather than inability, the manager may want to take disciplinary action, discussed in the next paragraph.

3. Conduct

Is the employee coming to work late or not requesting leave properly? Was he or she in a fight or talking rudely to fellow employees? Was he or she disrespectful or insubordinate to the supervisor? Has the employee been caught taking agency property home without permission? Was he or she drinking on duty? Did the employee violate an agency regulation about outside employment? These are all conduct problems, usually handled through disciplinary procedures. You have two ways to deal with these, depending on the severity of the conduct: lesser disciplinary actions, including reprimands, admonishments, and suspensions of 14 days or less; and more severe disciplinary actions, including suspensions of more than 14 days, reductions in grade, and removal. It is better to use the lesser disciplinary actions, including suspensions of 14 days or less when this type of action will correct the problem. It permits you to try to do so with the least severe action possible. Often, no further action is necessary. In addition, as less severe actions, they have fewer procedural requirements. Finally, they establish a record of progressive discipline, which will establish a better base if more severe action becomes necessary later. Section IVA shows the procedural steps involved in suspensions of 14 days or less. Other lesser disciplinary actions are covered by individual agency regulations or by the provisions of an applicable collective bargaining agreement. Sometimes you may find that the incident is so serious that you have no choice but to recommend or take more severe disciplinary adverse action, including suspensions for more than 14 days, reduction in grade, or removal. Section IVB covers these.

B. Special considerations

1. Alcohol, drugs, and other personal problems

a. Offer of counseling. When you discuss performance or conduct problems with your employee, he or she may tell you of a problem with alcohol or drugs, or a personal situation which is affecting performance or conduct. Refer the employee to your agency's employee assistance program. If the employee's problem is one of alcohol or drug use, the agency program may offer rehabilitative assistance or may refer the employee for treatment outside the agency. This period of rehabilitation may serve as an alternative to any personnel action you consider taking or be concurrent with actions.

b. Opportunity to bring up problem. If you only suspect the existence of alcohol or drug abuse as the reason for a performance or conduct deficiency, you should ask the employee assistance program counselor for advice on your next step. After you talk to the counselor, you probably will want to have an informal discussion with the employee on the unsatisfactory performance or conduct, and the possibility of future actions, and then refer him or her to the employee assistance program. If an employee that you believe has an alcohol or drug problem will not admit to it and/or seek help, when you have given an opportunity to do so, then you may go on with whatever action is necessary.

c. Failure to keep agreement. If the employee agrees to participate in a rehabilitation program and then does not keep appointments, or the rehabilitative efforts do not result in improved performance or conduct to an acceptable level, then you should take (or recommend) appropriate personnel action.

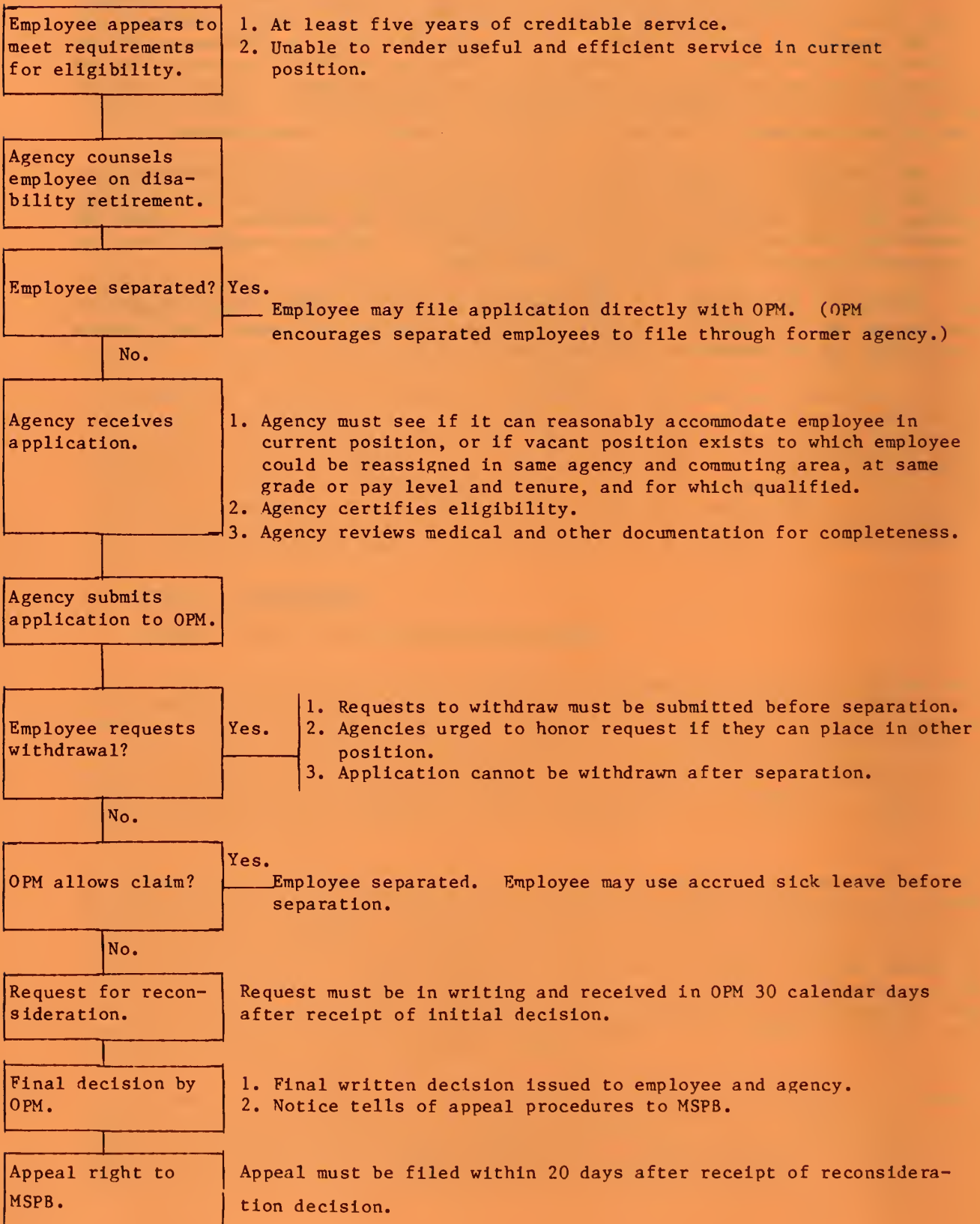
2. Reasonable accommodation

a. Possible handicapping condition. In the case of alcohol and drug problems, you are required to offer rehabilitative assistance as "reasonable accommodation" of the employee's known handicap. The employee may offer a physical or mental disability as the reason for a performance or conduct problem. You should ask him or her for a specific statement from a physician to substantiate the existence of the condition and its effects on the employee's job performance. Ask your personnel office what specific information you should request of the physician.

b. Ways of providing accommodation. If you find that the employee is indeed suffering from a handicapping condition, you will want to check with the personnel office on what steps can be taken to accommodate the condition -- either by changes to the current position or by reassignment to another position. Many employees can continue useful employment this way.

c. Disability retirement. If the employee's condition cannot be accommodated, and he or she is eligible, disability retirement may be the answer. Following is an outline of information on this procedure.

DISABILITY RETIREMENT APPLICATIONS OF EMPLOYEES



3. Leave problems

Leave use often presents difficulties for the supervisor: when to approve leave; when to disapprove leave; what to do when the employee has been on extensive approved sick leave; when you can take or propose action after you have approved excessive leave without pay, much of which should have been denied based on the need for the employee's services. Prolonged absence or repeated absence usually affects an employee's ability to do his or her job acceptably. Following is a necessarily simplified discussion of common concerns on approving or disapproving leave. Check with the personnel office for more detail on any given aspect, or on agency procedural requirements for restrictions placed on an individual's leave use and on your authority to grant or deny leave.

a. Annual leave. An employee has a right to take annual leave subject to requesting it properly and subject to the right of the agency to fix the time when it may be taken. The agency is not obligated to approve a request made either in advance or on an emergency basis if it requires the employee's services during the period for which leave is requested, no matter how valid the reasons for the request.

b. Sick leave for illness or injury. An employee is entitled to use accrued or accumulated sick leave when incapacitated by illness, injury, or pregnancy; receiving emergency medical treatment; or exposed to a contagious disease that would jeopardize the health of others. Your agency has the discretion to determine the nature of medical evidence required to support an employee's claim of illness or injury. If the evidence submitted in response to your request for documentation does not meet agency requirements, you or the appropriate official should deny the leave request.

c. Nonemergency or advance sick leave. If the employee requests sick leave for nonemergency purposes or requests advance sick leave (even with proper medical documentation), you or the responsible official have the authority to deny the employee's request if the employee's services are needed. If the employee fails to follow prescribed procedures for requesting or documenting emergency or nonemergency sick leave, the appropriate authority may deny the request if it considers extenuating circumstances insufficient to warrant approval.

d. Leave in connection with worker's compensation. An employee is entitled to use accrued and accumulated sick leave after suffering a work-related illness or injury. While the employee is waiting for adjudication of a claim for employee's compensation, he or she is entitled to use sick or annual leave, or leave without pay, as requested. Once entitlement to compensation has been granted and the employee exhausts or chooses not to use available sick leave, the agency has the discretion to decide whether to approve or deny any further request for annual leave or LWOP. (OPM's guidance recommends that under normal conditions, the employee be retained in a LWOP status for at least a year.) Your personnel office can help make decisions in this kind of situation.

e. Absence without leave. If you or the appropriate authority have denied a request for leave or have not authorized an absence, the absence from duty is properly recorded as absence without leave. Recording an absence this way is not a disciplinary action, but may form the basis for initiating future disciplinary action.

f. Extended leave without pay. Many supervisors unthinkingly grant LWOP repeatedly over an extended time, then suddenly wish to remove the employee. In most cases, a removal action cannot be based on approved sick or annual leave, or LWOP. There are exceptions to this, but only in unusual circumstances. See your

personnel office when you are faced with excessive approved absences and need to take action.

III. DEALING WITH POOR PERFORMANCE

A. Discussion of performance problem with employee

You should first sit down with the employee to discuss the poor performance. At times, you will need the assistance of special agency programs available to provide counseling for physical or mental conditions, alcohol or drug abuse, or other personal problems. If the employee does not understand exactly what must be done to bring performance to an acceptable level, you should tell him or her. Immediately after any discussion with the employee, you should take a few minutes and make a dated note for the file (with a copy to the employee), which documents the matters discussed and any assistance offered.

B. Notice of opportunity to improve performance to an acceptable level

If the employee continues to produce unacceptable work in at least one critical element of the job, or if at the end of the performance appraisal period you rate him or her unacceptable, you must inform the employee (preferably in writing) of the critical element(s) in which performance is unacceptable, and give the employee a reasonable time to show that he or she can do the work at the minimum acceptable standard for the critical element(s) or above. The time required depends on the employee's job, and any agency minimum requirements and the terms of a collective bargaining agreement (if applicable). Typically, this can vary (but is not restricted to) from 30 to 90 days. At this point also, you must take the necessary steps to deny the employee's within-grade increase. There is no requirement to give an advance written notice of performance deficiencies before denying the within-grade increase, if you have informed the employee of critical elements and performance standards at the beginning of the appraisal period. Following is an outline of the procedures for within-grade increase denials.

WITHHOLDING OF WITHIN-GRADE INCREASE UNDER SUBPART D OF 5 CFR PART 531
(Applies only to GS Employees)

Beginning of appraisal period.	Employee informed at beginning of performance appraisal period of performance level required to be at acceptable level of competence.
Completion of waiting period.	One, two, or three year waiting period, depending on the step to be attained.
Equivalent increase during waiting period?	Yes. No within-grade increase yet.
No.	
Performance at acceptable level of competence?	Yes. Within-grade increase given.
No.	
Written notice of negative determination.	1. Reasons for negative determination and respects in which performance must improve to receive within-grade increase. 2. Notice to employee of right to seek reconsideration. 3. Notification of name of official to whom request for reconsideration to be submitted. 4. Right to representation.
Employee requests reconsideration?	No.
Yes.	1. Request must be made not more than 15 days after receipt of notice. 2. Must give reasons for reconsideration.
Negative determination sustained?	No. Within-grade increase given effective on original due date.
Yes.	
Within-grade increase withheld.	1. Decision in writing with reasons for sustaining determination. 2. Inform employee of appeal rights.
Employee covered by negotiated agreement?	Yes. Review only under the terms of negotiated agreement.
No.	
Appeal to MSPB	

C. Actions during opportunity period

During this time, the agency must assist the employee to reach acceptable performance in any appropriate way, such as classroom or informal training, counseling, intensive coaching, etc. You should exercise close supervision over the employee and provide frequent oral feedback on work products. Again, note for the record with a copy to the employee on each thing done and when. However, written notes need not be sent for each observation. Records should be kept, but sent to the employee only at reasonable intervals. Excessive paperwork is not required.

D. Deciding what comes next

At the end of the period of time for the employee to show whether he or she can do the work acceptably, you will have to decide what to do next. If the employee has reached acceptable performance, there is no need for any action except to keep providing feedback and encouragement to the employee. If the employee is still performing unacceptably, you must take some action, at the very least, reassigning the employee out of the job in which he or she can not perform. If the agency has no jobs at the same grade for which the employee is qualified, then you or the appropriate official must reduce the employee in grade to a job he or she can do, or remove the employee.

E. Notice of proposed reduction in grade or removal for performance

You or the delegated agency official must give the employee 30 days' advance notice in writing explaining specific instances of unacceptable performance and the critical element(s) involved in each instance. The employee has the right to be represented by an attorney or other person, and a reasonable time (usually set forth in the agency procedures or the provisions of an applicable collective bargaining agreement) to reply to the proposal to take action both orally and/or in writing.

F. Documentation

In establishing the agency record, it is important that you have examples of work products that fail to meet previously set standards of performance, documents which detail the time given the employee to show acceptable performance and the assistance given, examples of the employee's performance during the opportunity period, and the various procedural steps followed in proposing and deciding the action. In addition, your documentation of any counseling, referral or attempts to refer for assistance, and so on, will provide a stronger case. Again, documentation need not be excessive, but only sufficient to the case. The agency's personnel office, and in some cases, its office of legal counsel, can help prepare these documents so that they support the recommended action in the most effective way.

G. Decision on proposed reduction in grade or removal

If you or the designated official decide to reduce the employee in grade or remove him or her, an official at a higher level must concur in that decision. For instance, the second line supervisor must approve the first line supervisor's decision. The decision must be in writing and tell the employee the instances of unacceptable performance that led to the decision. Finally, the agency must issue the decision within 30 days after the advance notice period expires.

H. Decision not to take action because of performance improvement

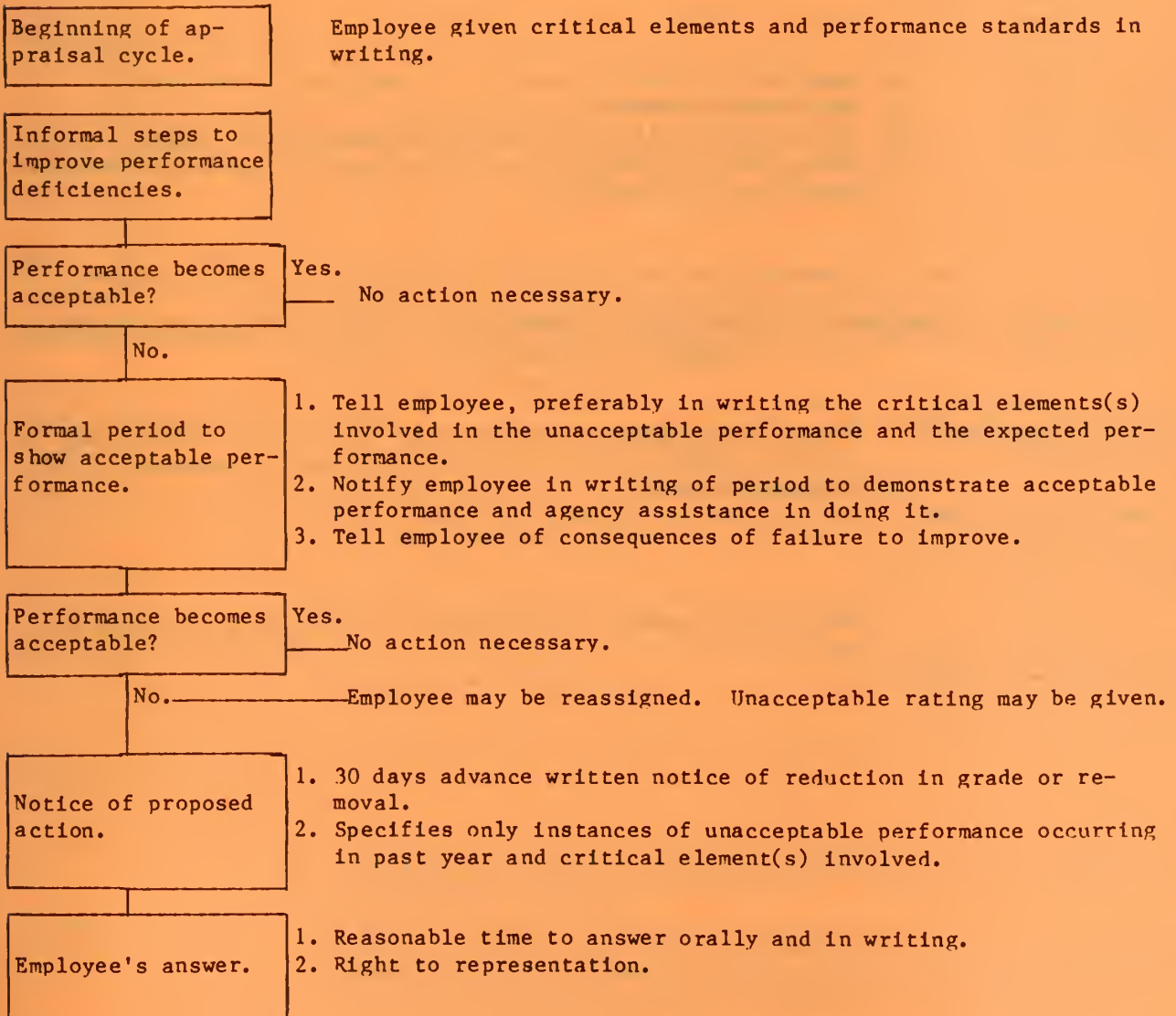
If the employee's performance improves to an acceptable level during the period of

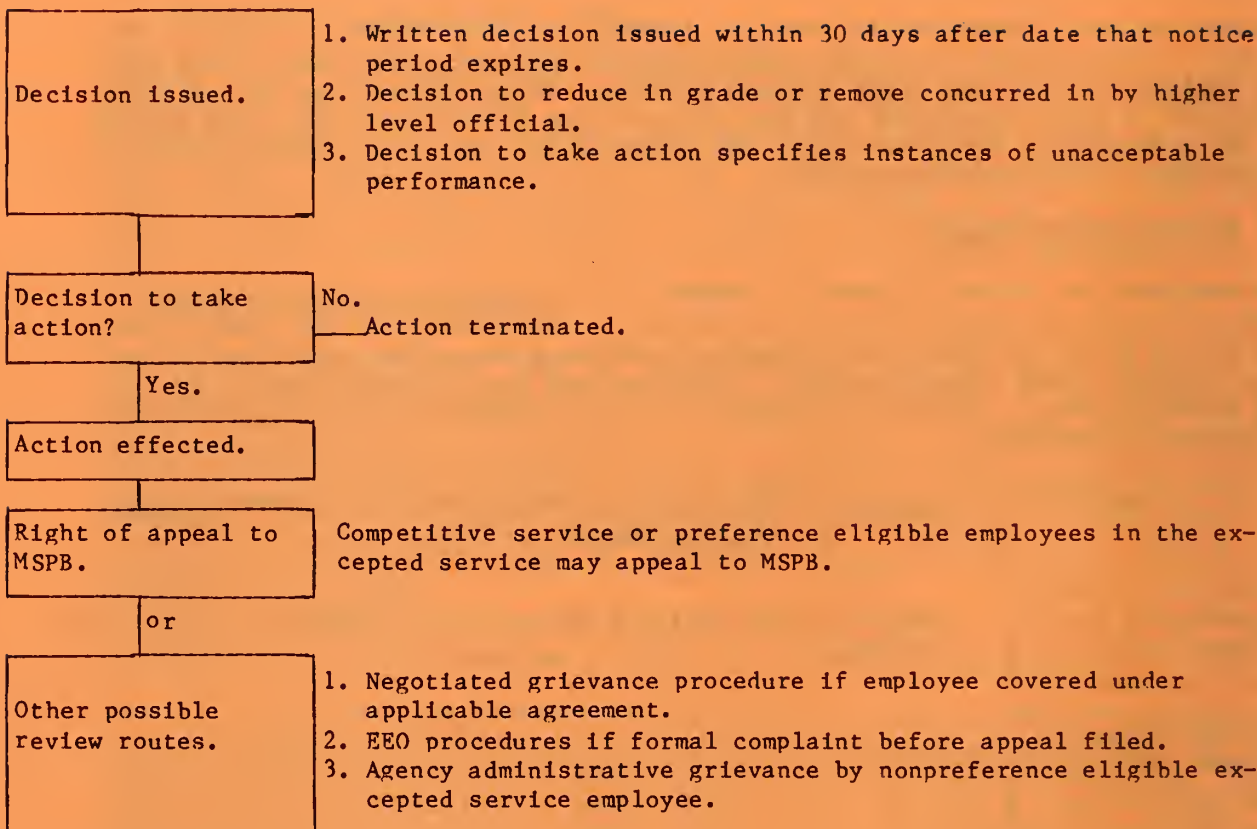
advance notice of reduction in grade or removal, you may decide to keep the employee in his or her job, after considering the improved performance along with the employee's reply and other relevant factors. If you do so, and the employee continues to do an acceptable job for one year, the agency must remove any record of the unacceptable performance from its files on the employee. This includes a performance rating of unacceptable.

I. Appeals and grievances

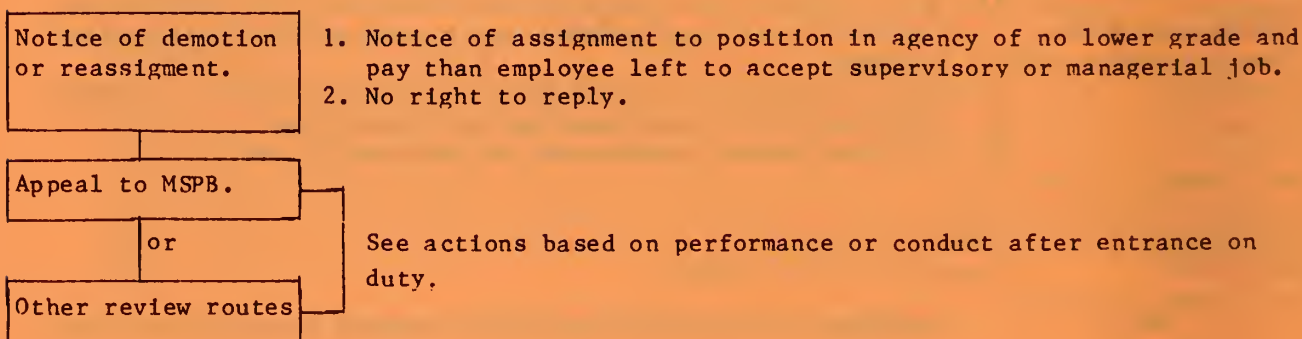
The employee can generally appeal a removal or reduction in grade to the Merit Systems Protection Board, or if he or she is in the bargaining unit, can grieve the action under the negotiated grievance procedures unless the negotiated procedure excludes these types of actions. The employee has to choose between the two and cannot do both. Here is an outline of the procedures for actions based on unacceptable performance.

REDUCTIONS IN GRADE AND REMOVAL BASED ON UNACCEPTABLE PERFORMANCE UNDER 5 CFR PART 432





REASSIGNMENT OR DEMOTION FOR UNSATISFACTORY PERFORMANCE AS SUPERVISOR OR MANAGER UNDER
SUBPART I OF PART 315

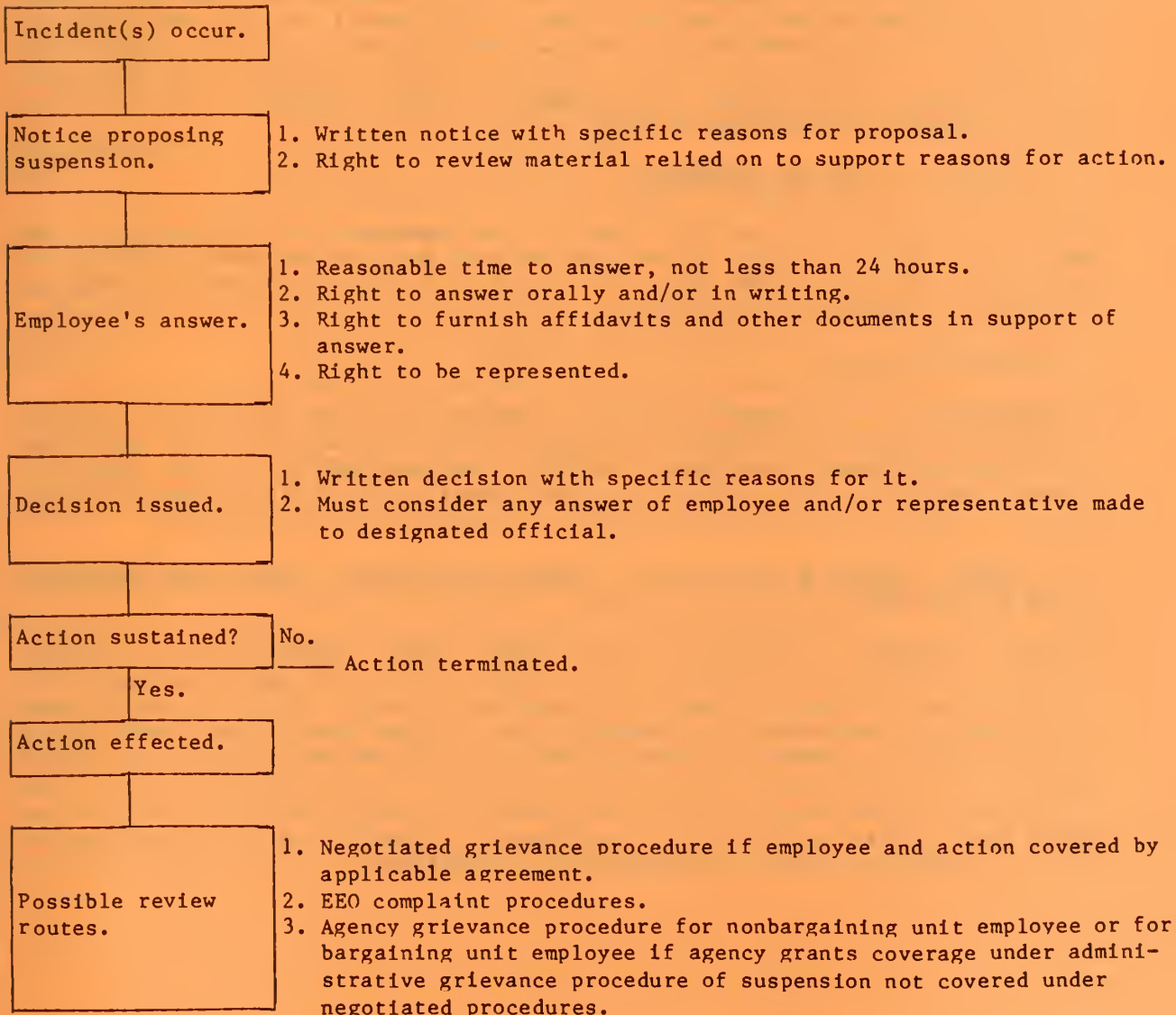


IV. DEALING WITH EMPLOYEE CONDUCT

A. Conduct requiring lesser disciplinary action

Many incidents of conduct are relatively minor, such as tardiness, rudeness to a fellow employee, playing a radio which disturbs others, etc. They may require no more than informal discussion with an employee, referral when appropriate to special agency programs providing counseling assistance on physical or mental conditions, alcohol or drug abuse, or other personal problems, or a warning. Note for the record each thing done, with a copy to the employee at reasonable intervals. If misconduct continues, you should consider some disciplinary action such as a reprimand or admonition under the agency's procedures, or a suspension of 14 days or less. While suspensions of 14 days or less have certain procedures to be followed, they and all other minor agency disciplinary actions have fewer procedural requirements. Here are the steps involved in taking a suspension of 14 days or less. Check with the personnel office to find out what other lesser disciplinary actions are available and appropriate, and the necessary steps to follow.

SUSPENSIONS FOR 14 DAYS OR LESS UNDER SUBPART B OF 5 CFR PART 752



1. Deciding to use a suspension of 14 days or less

When considering whether to use a suspension of 14 days or less, you must be aware that the law requires that the action be "for such cause as will promote the efficiency of the service." What this means is that the agency must document the facts on which the suspension is based; the employee's conduct must affect the employee's ability to do the job or the agency's mission; and the penalty must be appropriate considering the employee's work record, any past disciplinary actions, and all other favorable or unfavorable factors. If you believe these requirements are met, you should then propose or recommend the suspension.

2. Notice of proposed suspension

You, or the agency official with authority to propose a suspension of 14 days or less, must issue a written notice which proposes to suspend the employee and includes the specific reasons for the proposal. This notice must tell the employee that he or she has the right to see the various documents which the agency has relied on to support its reasons for action. The employee has a reasonable time to reply to the proposal to suspend him or her. This period of time must be at least 24 hours, but may extend longer under agency requirements or the terms of an applicable collective bargaining agreement. The employee can make a reply orally (in person) or in writing, or both, and has the right to have a representative, who can be an attorney, union representative, or other individual. He or she may submit documents in support of a reply.

3. Decision on proposed suspension

As soon as possible, but no later than when the suspension is to take effect, the appropriate agency official issues the written decision on whether or not the agency will suspend the employee. The notice of decision must tell the employee the specific reasons for the decision.

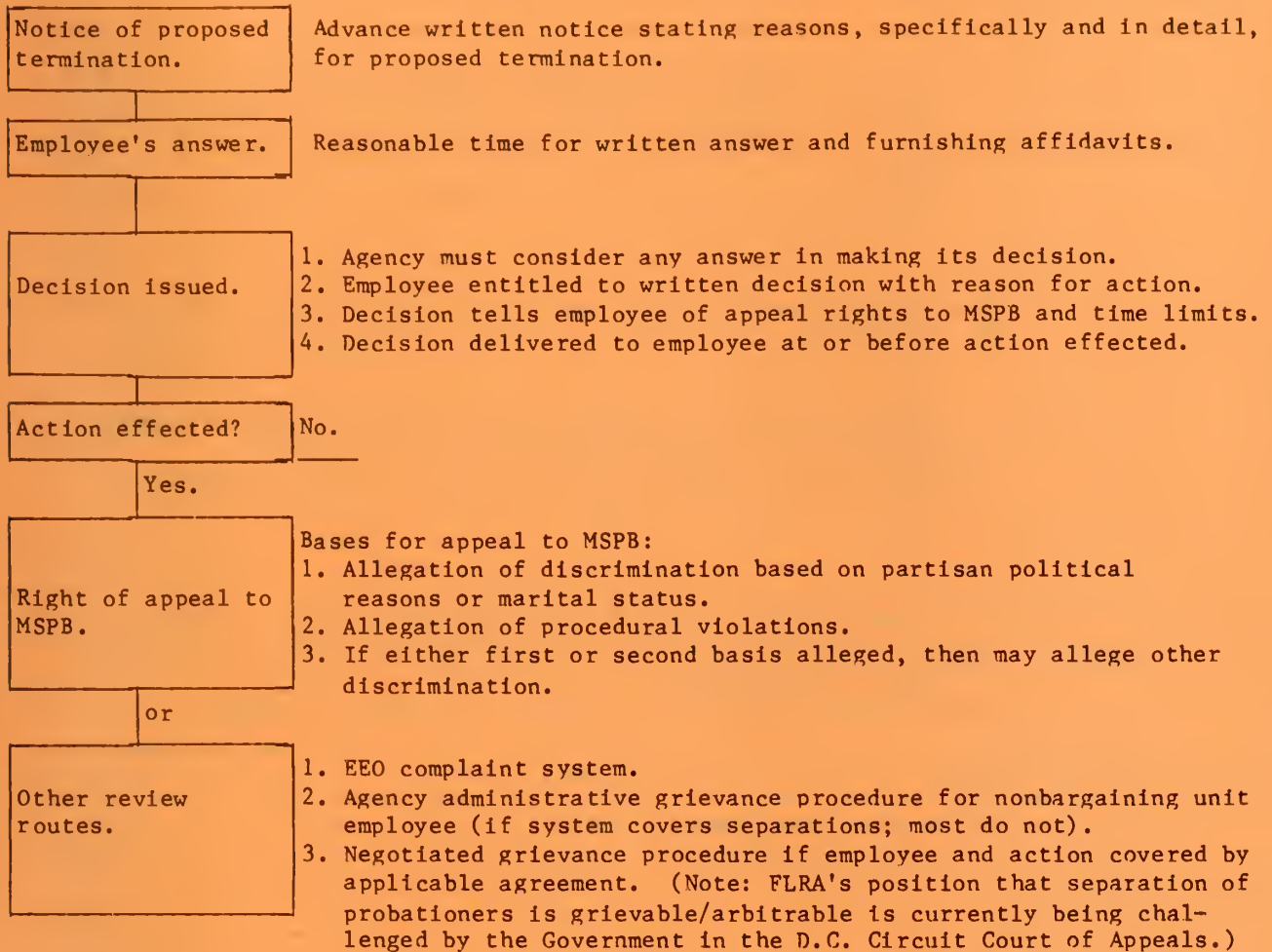
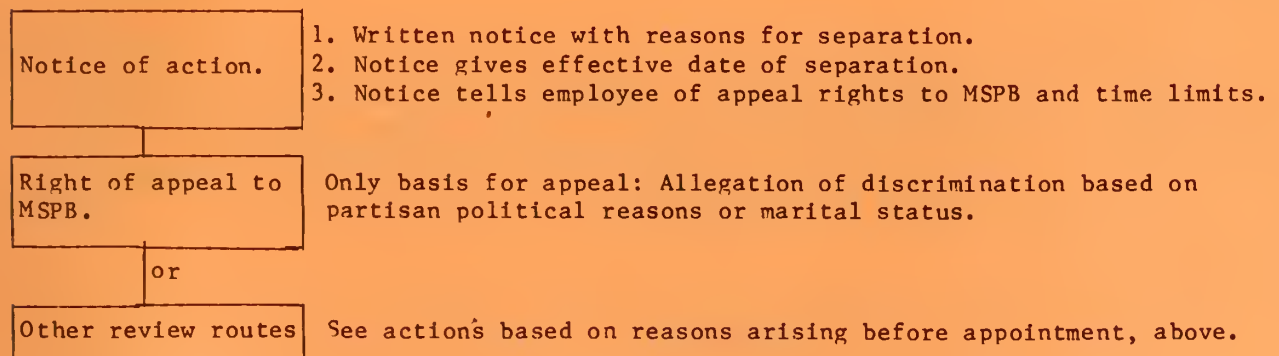
4. Review of action

If the employee is a member of a bargaining unit and the negotiated grievance procedure does not exclude suspensions for 14 days or less, he or she can grieve under the negotiated procedure. Otherwise, the employee may grieve under the agency grievance system. He or she cannot appeal to the Merit Systems Protection Board.

B. Conduct requiring disciplinary adverse action more severe than suspension of 14 days or less

Fighting, repeated or prolonged leave abuse, theft, falsification of official documents, repeated infractions involving less severe misconduct, or major violations of agency codes of conduct are examples of conduct which may require more severe disciplinary action, such as suspension of more than 14 days, reduction in grade, or removal. Where you have a reason to believe the employee may have a drinking or drug problem, check with the personnel office to see what to do. Following are two outlines for action: one showing the procedures for actions against probationers (also applicable for performance problems); and the procedures for more severe disciplinary actions under OPM's regulations.

ACTIONS DURING PROBATIONARY PERIOD UNDER SUBPART H OF 5 CFR PART 315

Separation for Reasons Based in Whole or in Part on Conditions Arising Before AppointmentSeparation for Performance or Conduct After Entrance on Duty

REMOVALS, REDUCTIONS IN GRADE, REDUCTION IN PAY, OR SUSPENSIONS UNDER SUBPART D OF
5 CFR PART 752

Incident(s) occur.

Notice of proposed
action.

1. 30 days' advance written notice with specific reasons for the action. (Less than 30 days if agency has reason to believe employee has committed a crime for which imprisonment can be imposed.)
2. Tells employee of right to review material relied on to support reasons for action.

Employee's answer.

1. Reasonable time but not less than 7 days to answer orally and/or in writing.
2. Right to furnish affidavits and other documentary evidence in support of answer.
3. Reasonable amount of official time to review material, prepare answer, and secure affidavits if in duty status.
4. Oral reply to official who can take or recommend action.
5. Right to representation.

Decision issued.

1. Written decision with specific reasons for it.
2. Must consider reasons in proposal and any answer of employee and/or representative.
3. Decision issued at or before time action is effected.

Action sustained?

No.

----- Action terminated.

Yes.

Action effected.

Right of appeal to
MSPB.

or

Other possible
review routes.

1. Negotiated grievance procedure if employee covered under applicable agreement.
2. EEO complaint if formal complaint before appeal filed.
3. Agency administrative grievance by nonpreference eligible excepted service employee.

1. Deciding to use more severe adverse disciplinary action

Like suspensions of 14 days or less, more severe adverse actions have to be "for such cause as will promote the efficiency of the service." You, with the help of the personnel office, will have to decide whether there is enough factual documentation to prove that the conduct for which the manager is considering more severe adverse action actually occurred. Next, the misconduct must actually have affected the employee's ability to do his work or the capability of the office to carry out its function. Finally, the particular disciplinary adverse action selected must be the appropriate one considering such things as the employee's past work and conduct, an agency guide to disciplinary action, past agency practice, and all other favorable or unfavorable factors. The personnel office can help you in selecting a particular disciplinary adverse action. Consult them also on how to note for the record all the considerations which influenced the choice of penalty.

2. Notice of proposed adverse action -- suspension of more than 14 days, reduction in grade, or removal

You, or the person with authority to propose a severe disciplinary adverse action, must issue a written notice proposing the specific action at least 30 days before the action is to take effect,¹ and giving the specific reasons for it. The employee ordinarily remains on duty during this time. (It is not a good idea to set a specific date for the action at this time, because you may need to delay it either because the employee needs more time for a reply or you need more time to make a decision.) If you or another person proposing the action has taken unfavorable factors such as a past disciplinary record or marginal performance into consideration in choosing the action, the proposal letter should tell the employee about these, so that he or she can address them in a reply. The proposal notice must tell the employee that he or she has the right to see the various documents which the agency has relied on to support its reasons for action. The employee has a reasonable time to reply to the agency's proposal to take adverse action, but not less than seven days. (Agency procedures or provisions of a collective bargaining agreement, if applicable, may call for more time.) The employee can make a reply orally (in person) or in writing, or both, and submit documents in support of that answer. The agency must give the employee a reasonable amount of official time (not specified but generally eight hours) to prepare his or her answer. The employee has the right to have a representative, who can be an attorney, a union representative, or other individual. The agency must designate an official to hear an employee's oral reply who can either recommend or make the final decision on taking action. (This could be the person who proposed the action, if the agency's procedures allow it.)

3. Documentation

You, with the help of the personnel office, will need to have available the documentary evidence required to support the case. This may include such documents as time and attendance cards, records of discussions with the employee, referrals for counseling, medical statements, letters of warning, etc. Other types of documentation include investigator reports, statements of witnesses, and any record of previous disciplinary action which the employee was provided the right to challenge. Here the obligations for documentation are stronger; but excessive

¹If the agency has a reasonable belief that the employee has committed a crime for which he or she could be sentenced to imprisonment, it may shorten the period between proposing the action and effecting the final decision to as few as seven days. See Section IVB6 on this.

